

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

**IN THE MATTER OF
THE PERMIT OF**

**GIO’S, INC.
d/b/a GIO’S
6247 BLUFFTON RD.
FORT WAYNE, IN 46809**

Permittee.

)
)
)
)
)
)
)
)
)
)
)

PERMIT #RR02-02625

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Permittee, Gio’s Inc., d/b/a Gio’s, 6247 Bluffton Road, Fort Wayne, Indiana 46809-2254 ("Permittee") is the holder of a Type 210 Alcohol and Tobacco Commission ("ATC" or “Commission”) permit number RR02-02625. The Permittee filed its application for renewal and that application was assigned to the Allen County Local Board (“Local Board”) for hearing. The Local Board heard the renewal request on November 13, 2006, and on that same day voted 2-1 to recommend denial of the renewal application. The Commission adopted the recommendation of the Local Board on November 21, 2006, and denied the renewal application.

The Permittee filed a timely notice of appeal and the matter was assigned to the Commission Hearing Judge, U-Jung Choe (“Hearing Judge”). The Hearing Judge assigned the matter for hearing on February 21, 2007, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Permittee was represented by attorney Samuel L. Bolinger. There were no remonstrators. The Hearing Judge took judicial and administrative notice of the entire contents of the file in this matter. Having reviewed the tape-recorded transcript of the Local Board hearing, the evidence submitted to the Commission during

the appeal hearing, and the contents of the entire ATC file, the Hearing Judge now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

1. Roy Duff. Mr. Duff is a co-owner of Gio's. He received three (3) gambling-related violations from the Indiana State Excise Police in 2006, which were resolved by paying a \$1,000 fine and receiving a 15-day suspension that was deferred for one year. Mr. Duff's attorney advised him that the "Cherry Master" machine were not illegal in the State of Indiana and showed him case laws that stated the machines were a game of skill, not a game of chance. Mr. Duff realizes now he was ill-advised by his former attorney. He no longer operates nor possesses any "Cherry Master" machines.

III. EVIDENCE BEFORE THE COMMISSION

1. Roy Duff. Prior to owning Gio's, Mr. Duff owned and operated Strazolo's Bar and Restaurant in Fort Wayne, Indiana. Mr. Duff had no violations at Strazolo's and maintained a clean record with the Commission. In addition to Gio's, Mr. Duff also owns Duffy's Bar and Grill ("Duffy's"), which is located in Huntington County. He also received three (3) gambling-related violations for possessing "Cherry Master" machines from the Indiana State Excise Police in 2006 for Duffy's. These violations were also settled with the ATC Prosecutor. In 2006, numerous other bars and restaurants in Allen County were cited by the Indiana State Excise Police for possessing illegal gambling devices at their permit premises. Mr. Duff has had no prior violation history with the Commission other than possession of illegal gaming devices in 2006.

Duffy's renewal application hearing was heard before the Local Board ten (10) days

before the Gio's hearing. Duffy's application was approved by a vote of 3-1, whereas Gio's application was denied by the same Local Board, although each permit premises received the same number of charges for possessing illegal gaming devices. Mr. Duff has not had any "Cherry Master" machines since May 2006 and has not received any violations since.

2. Laurie Duff. Ms. Duff is a 50% owner of Gio's Inc. She is not married to Mr. Duff. Ms. Duff works at Gio's daily and has no ownership interest in Duffy's.

IV. FINDINGS OF FACT

1. Gio's Inc., d/b/a Gio's, 6247 Bluffton Road, Fort Wayne, Indiana 46809-2254 ("Permittee") is the holder of a Type 210 ATC permit number RR02-02625. Gio's is located in District Two. (ATC File).

2. The permit was first issued in 2000, and has been renewed since that time. (ATC Hearing; ATC File).

3. Prior to owning Gio's, Mr. Duff owned and operated Strazolo's in Fort Wayne, Indiana. Mr. Duff had no violations at Strazolo's and maintained a clean record with the ATC.

4. Gio's was cited for three (3) ATC violations in 2006. All three (3) violations were for determination of reputation and character and public nuisance to wit: illegal gambling (905 IAC 1-27-1, 2). The violations occurred on February 11, 2006, April 25, 2006 and May 12, 2006.

5. On October 24, 2006, The ATC Prosecutor and Mr. Duff entered into an "offer and acceptance of settlement" (revised settlement offer). The agreed-upon fine was timely paid and Gio's was placed on probation for fifteen (15) days, which was deferred for one (1) year.

6. Since the May 12, 2006 violation, Gio's has not been cited for any further

violations nor have Mr. Duff and/or Ms. Duff been arrested, charged and/or indicted for any criminal offense under Indiana Law.

7. All “Cherry Master” machines have been removed from Gio’s since May 12, 2006.

8. Gio’s employs 15 to 22 individuals. The number of employees fluctuates depending upon the season and customer demand. Gio’s serves lunch and has dancing in the evening and on weekends. Gio’s is a restaurant/bar with seating capacity for 237 people.

9. Prior to the “Cherry Master” related incidents 2006, Gio’s had one (1) violation in 2004 for having a minor in the facility.

10. Gio’s is current as to its taxes.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind.

Code § 4-21.5-3-27(d).

6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; See also, *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).

8. To deny the application to this Permittee while granting applications to other similarly situated permittees would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

9. The Permittee has taken steps to ameliorate the problems which led to issues of renewal before the Local Board. Ind. Code § 7.1-2-6-1(c); 905 IAC 1-27-2.

10. The Commission may grant or deny an application accordingly as it deems the public interest will be best served. Ind. Code § 7.1-3-19-10.

11. Where the Permittee has (i) had no violations issued to it since resolution with the Commission; and (ii) shown to the Commission that it is making serious efforts to improve its business practices and conform them to rules and regulations of the Commission, retention of the permit is in the best public interest. *Id.*

12. The penalty of non-renewal of the permit in this case is disproportionate to the offenses committed. Ind. Code § 7.1-3-19-1.

13. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the appeal of the Permittee, Gio's Inc., d/b/a Gio's, 6247 Bluffton Road, Fort Wayne, Indiana 46809, for the renewal of a Type 210 Alcohol and Tobacco Commission permit, permit number RR02-02625, is hereby CONDITIONALLY GRANTED, and the recommendation of the Local Board in this matter is reversed. If the Permittee is cited for any other violations within twelve (12) months of this Order, the permit RR02-02625 shall be immediately revoked.

Dated: March 29, 2007

U-Jung Choe, Hearing Judge